In The

Supreme Court of the United States

October Term, 1975

No. 75-640

MARTIN FRANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, rendered the 27th day of June, 1975, affirming the judgment of the United States District Court for the Southern District of New York (Harold R. Tyler, Jr., Judge), convicting petitioner of conspiracy to violate the federal security laws, 18 U.S.C. §371. Petitioner was acquitted of all substantive counts.

Petitioner, a practicing attorney, was sentenced to two years imprisonment and a $2,500 fine. He is presently incarcerated.

OPINION BELOW

The opinion below has not yet been officially reported, but is reprinted in the appendix herein.

JURISDICTION

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of New York on the 27th day of June, 1975. A petition for rehearing was denied on the 8th day of September, 1975. By order of Mr. Justice Brennan of this Court, petitioner was granted an extension of time until October 30, 1975, within which to file this petition. A copy of that order is in the appendix hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Government violated both the letter and spirit of *Massiah v. United States,* 377 U.S. 201 by prevailing upon the co-defendant, Jerome Allen, a former client and "friend" of petitioner's, to surreptitiously record a conversation the Government urged him to have with petitioner, which took place in the law offices shared by petitioner and his own attorney, at a point in time after Frank's arraignment on his indictment?

Although the Court ruled the conversation with Allen inadmissible, the Government reaped the important alternative advantage of thereby keeping Frank off the witness stand for

fear that the statement obtained would be used for purposes of impeachment. *(Harris v. New York,* 401 U.S. 222.)

2. Whether petitioner's rights to a fair trial under the Fifth Amendment were violated by the Trial Court's incredible ruling that over 500 pages of testimony by the co-defendant Allen, much of it favorable to Frank, should be disregarded by the jury; yet allowing consideration of the Government's rebuttal testimony with respect thereto?

3. Whether petitioner was deprived of a speedy trial in violation of the Sixth Amendment by compelling him to stand trial on an indictment returned almost five years after an SEC investigation had unearthed the material upon which the true bill was predicated, during which hiatus an important defense witness ("Bud" Moss) had died, and memories had grown dim? *(United States v. Marion,* 404 U.S. 307.)

4. Whether this Court, in its supervisory powers over federal courts, should redefine Wharton's "Rule" and the doctrine of "fundamental fairness" to preclude conviction on a conspiracy count where, as herein, the petitioner has been acquitted of the substantive charges, all of which were interrelated to the conspiracy count?

5. Whether the denial of both lower courts to permit petitioner to see and review certain Jenck's Act (18 U.S.C. §3500) material, violated his Fifth Amendment right to a fair trial?

6. Whether petitioner's rights to a fair trial in violation of the Fifth Amendment were infringed by a shift in the

Government's theory of the prosecution from that of fraudulent manipulation in the sale and purchase of "Training With the Pros" stock, to that of undisclosed underwriters?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein are 15 U.S.C. §§77j(b), 77q(a), 77(x), 78ff, 78j(b), 78j(c); 18 U.S.C. §§371, 1001, 1341, 3283, 3500; Rule 10b 5 (17 C.F.R. 240, 10b 5); Rule 48(b) F. R. Crim. P.; Securities and Exchange Act of 1934; and the Fifth and Sixth Amendments of the United States Constitution.

THE INDICTMENT

Count 1 of the indictment charged the defendants with conspiracy to violate the Federal Securities Laws (Title 15, United States Code, Sections 77q(a) and 78j(b) and mail fraud (Title 18, United States Code, Section 1341).

Count 2 charged the defendants with, in substance, fraud in the offer and sale of the securities of "Training With the Pros, Inc." in violation of Title 18, United States Code, Section 77q(a).

Counts 3 through 6 charged the defendants, in substance, with fraud in connection with the purchase and sale of the stock of "Training With the Pros, Inc.," [hereinafter "TWP"], in violation of 15 U.S.C. §78j(b)(c).

Counts 7 through 10 charged the defendants with the use of the mails to commit fraud in violation of 18 U.S.C. Section 1341.

Counts 11 through 16 charged defendant Stoller only, with the making of false statements to the United States Securities and Exchange Commission in violation of 18 U.S.C. Section 1001.

Only Count 1 is material to petitioner Frank on this petition. Notwithstanding this fact, however, we believe that he was severely prejudiced by being tried jointly with co-defendant Stoller with respect to the counts charging a violation of 18 U.S.C. §1001, namely Counts 11 through 16 of the indictment. A severance motion was denied.

It should be noted that petitioner Martin Frank was convicted of no substantive count, but only of the conspiracy.

Count 1, that is the conspiracy count of the indictment, briefly consists of the following allegations:

The defendants and certain unindicted co-conspirators allegedly schemed to obtain a large portion of a public offering of the common stock of a corporation known as "Training With the Pros, Inc." [TWP].[1]

It was part of the alleged conspiracy that the co-conspirators and the defendants would "park" this stock in coded Swiss bank accounts, to make a large profit by later transferring the stock to other persons, and then to cause brokers to recommend purchases of this stock in order to raise its price so that such other persons could then sell the stock at a

1. The Court however, submitted the case on the theory of undisclosed underwriters which was not what the trial sought to prove.

profit. The most important of the unindicted co-conspirators was Ramon D'Onofrio. Another alleged co-conspirator was E.H. "Bud" Moss, who had been president of TWP. He died before the trial.

Before the enlistment of co-defendants Phillip Stoller and Jerome Allen in the conspiracy, D'Onofrio met with Moss to discuss a public offering of the stock of TWP. The indictment also charges that D'Onofrio thereafter met with Stoller and Allen and hatched the illegal scheme. It alleges that D'Onofrio later had a meeting with defendant Martin Frank and discussed various methods for perpetrating the alleged fraudulent scheme.

It is extremely significant to note, because of a later point in this brief, that all of the events took place in 1968 and 1969. As a matter of fact, the last overt act is claimed to have occurred on or about May 21, 1969. The "means" paragraphs alleged various acts and transactions commencing prior to June 21, 1968, and culminating in May of 1969.

Perhaps some of the most important allegations in the indictment, especially from the point of view of petitioner Frank, are claims that defendant Stoller and petitioner Frank had various meetings with defendant Allen and co-conspirator D'Onofrio. Supposedly at these meetings the conspiracy was hatched and the details were agreed upon, according to the indictment.

The Government, in its bills of particulars, proved unable, however, to state the dates when these meetings took place, thus preventing and frustrating the defense from gathering evidence

contradicting the Government's claims. The defense was precluded, for example, from proving that an alleged meeting could not have taken place at the time claimed because Stoller was out of town at the time.

SUMMARY OF THE REASONS FOR GRANTING CERTIORARI

Among, but by no means all, of the reasons we advanced why this Court should grant certiorari are the following:

1. The Government violated both the letter and spirit of *Massiah v. United States,* 377 U.S. 201, by prevailing upon the co-defendant Jerome Allen, a former client and "friend" of petitioner's to surreptiously record a conversation the Government urged him to have with petitioner, which took place in the law office shared by petitioner and his own attorney, at a point in time after Frank's arraignment on his indictment.

Although the Court ruled the conversation inadmissible, the Government reaped the important alternative advantage of thereby keeping Frank off the stand for fear that the statement would be used for purposes of impeachment. *(Harris v. New York,* 401 U.S. 222.)

2. The co-defendant Allen was quite understandably called to the stand by the co-defendant, Stoller, who was represented by a different attorney, and who was charged with more counts than Frank, and in differing contexts.

Allen testified as to a great deal of matters tending not only to exculpate Frank, but to give the strong impression that the

trial prosecutor and the Government forced and threatened Allen into giving information and other material in support of the prosecution's case. Allen stuck to his story even on cross-examination, and despite the fact that he faced a perjury indictment thereby, to say nothing of the fact that he had not yet been sentenced himself.[2]

The Trial Court, incredibly, directed the jury to disregard all of the direct and cross-examination of Allen which was favorable or exculpatory of Frank. It refused to instruct the veniremen to also disregard the rebuttal testimony of the Government impeaching Allen's credibility. Thus the "good" testimony vis-a-vis Frank was interred with Allen's departure from the stand, but the "evil" portion survived to "bury" Frank.

3. The Trial Court refused to dismiss the indictment despite the fact that it could have been found several years earlier when an SEC investigation already uncovered the material which formed the basis of the indictment. The last overt act was about four and three-quarter (4¾) years prior to the indictment.

The Government could not give specific information about the occurrence of certain events because of the length of time which had elapsed, and certainly memories had grown dim, documents had been destroyed or lost in all likelihood, and the defendant had been lulled into a false sense of security.

Most pertinent, however, is the fact that "Bud" Moss, the president of TWP had died in the interim. That he could have

2. Subsequently, in a different proceeding Allen apparently withdrew his allegations against the prosecutor, but did not retract his exculpatory statements about Frank.

given important exculpatory evidence is assured by the fact that his testimony was taken at the SEC hearing, but the Trial Court refused to admit this, despite its exculpatory nature.

4. Since the substantive counts in which Frank was charged (2 through 10), embraced essential language of the conspiracy count (Count 1), coupled with the fact that the substantive charges necessarily required the joint participation of two or more persons, we maintain that by virtue of his acquittal on all of the substantive charges, Frank cannot remain convicted on the conspiracy.

5. A severance of Counts 11-16 which only referred to Stoller was demanded by Frank since he was prejudiced by much irrelevant testimony against Stoller being admitted which did not relate to him at all. The Trial Court denied the severance.

6. Additionally, certain probable 3500 and "Brady" material was demanded of the Government, which it has refused to turn over. The Court of Appeals also declined to do so.

7. The Trial Court refused certain charges and gave others that were highly prejudicial and erroneous. Marilyn Herzfeld, who like D'Onofrio, was a Government witness, testified that D'Onofrio first met petitioner much later than the witness D'Onofrio testified. Since the Government vouched for both so far as credibility is concerned, the Trial Court should have charged that the jury must acquit if it believed Herzfeld and not D'Onofrio. The Trial Court refused to do so.

8. After dismissing Paragraph 5(r) of Count 1, relating to $15,000 which Frank allegedly received for his part in the case, the Government nevertheless referred to it in its summation, which the Trial Court refused to correct in the charge.

9. The Trial Court shifted the theory of the case in its charge to the surprise of petitioner by indicating that the case turned on the question of "undisclosed underwriters." The petitioner had been defending on the ground of a conspiracy among the several defendants and conspirators to engage in the fraudulent sale and purchase of the TWP stock, that is to manipulate it.[3]

There are other errors which we shall not detail at this time.

THE FACTUAL BACKGROUND

The main witness against Frank was D'Onofrio, who inculpated both Stoller and Frank. He allegedly met Frank in 1968, but Marilyn Herzfeld, another Government witness said that she was present in the middle of 1969 when D'Onofrio introduced himself to Frank (TT1118).[4]

The Government sought to paint Frank as the "architect" of the scheme (TT20). Sorkin, the prosecutor, described in his opening, and through D'Onofrio and others, the alleged machinations of opening Swiss bank accounts in various names

3. The Trial Judge and the Court below indicate that there was no surprise to petitioner. They did not justify the deviation from the language of the indictment (*Stirone v. United States*, 361 U.S. 212; *Ex Parte Bain*, 121 U.S. 1, 12).

4. The prefix "TT" means "trial transcript."

and the artificial raising of the price of the TWP stock through the use of nominees.

But actually, Frank did not come into the picture until considerably after the alleged conspiracy was set up. Moss' testimony before the SEC, which the Trial Court refused to admit, since he had died shortly before trial. would have exculpated Frank substantially by giving plausible reasons for the events. The Government's case referred to conversations with Moss, but the Trial Court disallowed all of Moss' SEC testimony.

The fact that the "indication letter" (Exh. 4) from Bank Hofmann was sent over to the U.S.A. on October 17, 1968, but the offering circular to TWP was not filed until October 25, 1968 was the subject of a great deal of comment and testimony. The fact of the matter is that Frank, according to Herzfeld, did not even meet D'Onofrio until the middle of 1969.

Allen's testimony, *infra,* was that it would have been absurd for Frank to tell him and the others to use "nominees" if they wanted to manipulate the stock, since Allen said that no one would have to tell this to an "old pro" like him (Allen).

Supposedly, Frank was to get $15,000 as his share of the scheme (Count 1, Par. 5(r)). The Government, however, consented to a dismissal of this charge since admittedly no proof thereof was adduced.

The Government, in its opening, said that D'Onofrio was a swindler and criminal and was facing "17 years in prison"

(TT31). As the testimony of Melvin Hiller indicated, D'Onofrio was promised about 2 years in Egland Air Base.[5] As we indicate *infra,* that is almost the exact sentence of incarceration which he got! It is inferable that the Government had reason to know this, if Hiller is accurate. Future events bore this out, so we assume his accuracy.

In his opening, the prosecutor referred to the post-indictment tape of Allen and Frank, which the Trial Court refused to allow into evidence (TT32, 33). This was an unfair tactic.

As we shall indicate, *infra,* Jerome Allen, one of the conspirator-defendants was deeply involved in the indictment and in the opening remarks of the prosecution. It was therefore surprising that the Government had not called him as a witness.

Mr. Gould, counsel for Stoller, quite properly and naturally summoned Allen as a witness. When Allen testified, it became clear why the Government wanted no part of him. As we detail *infra,* Allen painted a picture of subornation, trickery, threats and coercion on the part of the Government in bringing the indictment and in procuring and trying to procure Allen as its witness. Allen gave considerable exculpatory testimony concerning Frank. Allen, however, was not Frank's witness, and for all intents and purposes, he did not examine Allen.

The Government, although the election to join Frank and Stoller in one trial was its own, argued that the exculpatory

5. Hiller said that in Fall 1973, D'Onofrio told him he was being paid $200-$400 weekly by the Government; that he was traveling back and forth from Las Vegas Friday to Monday at Government expense; and that D'Onofrio said he was promised about 2 years imprisonment at Egland Air Base (TT2323, 2324).

testimony of Allen should be stricken since there was a "unitary" defense. The Trial Court incredibly granted the motion and instructed the jury to disregard any exculpatory testimony of Allen's.

The record is bare of any evidence of a "unitary" defense. The charges were substantially distinguishable against Stoller and Frank, and they were represented by different lawyers. The Government therefore was able to "penalize" the petitioner because of its own choice in trying him jointly with Stoller, thus precluding a fair trial. The prosecution, in essence, maintained that Allen could not be called at all if it turned out that he would say anything favorable to the defendant Frank, even if Frank didn't use him as his own witness. This was the most incredible ruling counsel herein has ever seen.

ARGUMENT

I.

The Government violated both the letter and spirit of *Massiah v. United States*, 377 U.S. 201, when following Frank's indictment and arraignment, they procured the cooperation of co-defendant, Jerome Allen, who had been a former client of Frank's, to go to the latter's office, engage him in an incriminating conversation which was being recorded and broadcast, and then seek to use this evidence against petitioner.

Since an incriminating statement was obtained by this highly improper method, the Government succeeded in preventing petitioner Frank from taking the witness stand in his own defense for fear that the incriminatory language of the taped conversation could then be used to impeach him. (*Harris v. New York*, 401 U.S. 222.)

There are a number of errors which we have adverted to in this brief, but we submit that one of the most outrageous and glaring among them is the technique employed by the prosecution which violated the letter and spirit of *Massiah v. United States*, 377 U.S. 201 (1964).

The Government, following the indictment and arraignment of petitioner Martin Frank, procured the cooperation of the co-defendant Jerome Allen. Since it was Allen's desire to help himself as much as possible with respect to a good deal of prior and present criminality, he agreed, at the suggestion of the Government, to permit himself to be wired up and then go to

petitioner Frank's office and seek to engage him in an incriminating conversation concerning the very subject matter of the indictment which had recently been handed up.[6] The Trial Court held the conversation did indeed concern the instant case and not any separate investigation.

Allen, who the Trial Judge, Honorable Harold Tyler, described as a "Trojan horse" (Minutes of Sentence, *United States v. Jerome Allen*, 74 Cr. 979, 74 Cr. 159, 73 Cr. 471 and 73 Cr. 747, February 21, 1975, Southern District of New York, page 13), was a reluctant participant in the unscrupulous scheme which the Government concocted following the indictment.

We submit that this tactic, employed knowingly and deliberately by the Government, is so shocking that this Court should reverse the conviction irrespective of any other error in the case (*cf., United States v. Toscanino*, 500 F.2d 267 (2 Cir. 1974); *Spano v. New York*, 360 U.S. 315 (1959)).

To see the prejudice in the proper perspective, we must recognize that if the defendant Frank took the stand in his own behalf, the tape recording which was made of his conversation with Allen, could be introduced, at the very least, for the purposes of impeaching his credibility. (*Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954); *Tate v. United States*, 283 F.2d 377 (D.C. Cir. 1960); and, *United States v. Curry*, 358 F.2d 904 (2 Cir. 1966).)

But, see, *Groshart v. United States*, 392 F.2d 172 (9 Cir. 1968).

---

6. See testimony of Thomas Doonan (TT1397, 1404-1407, 1427). Frank objected under *Massiah* (TT1433, 1434).

We feel it appropriate to interject at this point the fact that the Trial Judge ruled that the statement obtained following indictment, by Allen's devious conduct at the behest of the Government was inadmissible on the direct case of the prosecution, although it tried to use it on cross examination of Allen.

But returning to the dilemma upon the horns of which petitioner found himself, Martin Frank was "damned if he took the stand" and "damned if he didn't." In effect, the Government had to benefit by its own wrongdoing. This is obvious from the fact that if Allen could not reveal the statement on examination by the Government, the defense certainly would fear the statement would be introduced if Frank testified. If petitioner Martin Frank took the stand in his own behalf, and certainly this would have been natural since he had never been convicted of a crime, he faced the distinct probability that the incriminatory portions of his conversation with Allen would be introduced against him for impeachment purposes.

The only other alternative, which is the one adopted at the trial, was to keep the petitioner off the stand so that the jury would not be able to hear what might very well be interpreted as a highly incriminating statement.

Petitioner Frank conceivably could have tried to explain away the incriminatory portions of the statement, but the risk was far greater than the benefit possibly to be achieved by attempting to do this. Moreover, the Government's outrageous action had created this predicament by riding rough-shod over Frank's rights.

Thus the Government succeeded in one of its objectives and that was to keep petitioner Martin Frank from taking the stand in his own behalf.[7]

In I Cooley, Const. Lim. (8th Ed.) 646, Judge Cooley in this monumental work appropriately asserted:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them *immense power for oppression;* and it is to be *feared* they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . . .
>
> It is the *duty of the prosecuting attorney* to treat the accused with *judicial fairness;* to inflict injury at the expense of justice is no part of the purpose for which he is chosen. *Unfortunately* however, we sometimes meet with cases in which these officers appear to regard themselves *as the counsel for the complaining party rather than impartial representatives of public justice."* (Emphasis added.)

Mr. Justice Roberts in *Sorrells v. United States,* 287 U.S. 435 (1932), in an opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred, stated *(id.* at 453):

7. Allen testified that the prosecutor told him that they must entrap and convict petitioner — that the case must be won (TT2661, 2946). See Point II.

> "The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods . . . . "

Justice Roberts continued by referring to these methods as a "prostitution of the criminal law" (*id.* 287 U.S. at 457).

To explain the thrust of the *Massiah* problem, we ask this Court to bear in mind that the method used was not for the purpose of an investigation since that had terminated with the finding of the indictment. After all, the petitioner had already been formally accused and was entitled to the benefit of counsel at all stages of any proceedings against him.

In the *Massiah* case, we must realize that we are not dealing with custodial interrogation as is the situation in such cases as *Miranda v. United States,* 384 U.S. 436 (1966), or in *Escobedo v. Illinois,* 378 U.S. 368 (1964).

Massiah established the doctrine that post-indictment statements may not be used against a defendant if they have been deliberately elicited by a law enforcement agent outside the presence of counsel.

Massiah had been indicted in federal court; he retained a lawyer, pleaded not guilty, and was admitted to bail. A second defendant, indicted with Massiah, surreptitiously decided to cooperate with the federal authorities. A federal agent installed a radio in an automobile in which Massiah and the cooperating defendant were riding, and overheard their conversation. Massiah made certain incriminating statements to which the federal agent testified at Massiah's trial.

This Court held that Massiah's right to counsel and his privilege against self-incrimination were violated by the admission of the statements into evidence. The Court therefore reversed the conviction.

According to the opinion, the defendant Massiah was denied the basic protection of the Sixth Amendment guarantee "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." (*Massiah v. United States,* 377 U.S. at 206.)

This Court in *Massiah* was careful to emphasize that it was not intending to foreclose, by its opinion, investigative activities by federal agents not related to the pending indictment — apparently the thrust of the opinion was that the statements received in the course of the investigation could not be used in the prosecution of the crime for which the defendant was already under indictment.

We ask this Court to note that in the Trial Court, Judge Tyler ruled the statement inadmissible since he found that it clearly related to the subject matter of the indictment and was not referrable to any other type of crime such as obstruction of justice. Moreover, it occurred in the law office petitioner shared with his own attorney, Feldshuh.

Massiah was a natural extension of *Spano v. New York,* 360 U.S. 315 (1959).

There, too, an incriminating statement was obtained in the absence of counsel from Spano by law enforcement authorities following his indictment.

It is interesting to note that in the *Spano* case, Patrolman Bruno, a long-time friend of Spano's was used as a "Trojan horse" to lull him into a false sense of security and discuss the case, thus incriminating himself.

The same tactic was used in *Massiah v. United States, supra,* and we submit that in the case at bar, the exact same ploy was also utilized.

This Court in *Spano* quoted John Gay's couplet:

> "An open foe may be a curse, but a pretended friend is worse."

Certainly Allen was posing as a "friend" of the petitioner herein.

Incidentally, at page 9 of the transcript of the conversation between Allen and Frank, to which we have been referring, the following statement by Frank is made in response to a remark by Allen:

> "There's no question in my mind, and I know there is none in yours, that you paid me $15,000 for telling you how to do the Training deal. There's no question in my mind. I had to tell you and Ray and Jerry."[8]

We think it pertinent to call this Court's attention to a recent decision of the United States Court of Appeals for the

8. It is apparent that "Jerry" is a mistake since we assume "Phil" was intended. Allen testified at trial that no $15,000 was ever paid to Frank.

Second Circuit, in *United States v. Badalamente,* F.2d (2 Cir. NDS 1186-1205, Sept. Term 1973, Decided November 21, 1974), where the same *dramatis personae,* namely Assistant United States Attorney Sorkin and Jerome Allen, were also involved. That Court reversed the conviction of Herbert Yagid in that case, and we particularly commend that Court to its opinion, specifically with reference to footnote 1 on Slip Opinion, page 5905 going on to 5906.

In *Coopedge v. United States,* 369 U.S. 438, this Court aptly proclaimed and cautioned (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to the law as a whole can well be expected without need for prompt, *eminently fair* and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the *quality of our civilization may be judged.*" (Emphasis ours.)

We therefore submit that the conduct of the Government in obtaining an incriminatory statement from a named defendant in a criminal case where he has already been indicted and arraigned, is so shocking that irrespective of any other error, it requires reversal.

Indeed, we would go so far as to suggest that just as in *Mesarosh v. United States,* 352 U.S., and in *Lee v. Florida,* 392

U.S. 378 (1968), it might very well be warranted to dismiss the indictment altogether so as to teach the Government that it may not trifle with the rights of its citizens despite the temptation that may have offered itself to obtain an incriminating statement by using, as Judge Tyler described, a "Trojan horse."

In *Mesarosh v. United States,* 352 U.S. 1-9, 14, this Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus this Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in *McNabb v. United States,* 318 U.S. 322, this Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

II.

Incredible as it seems, the Trial Judge actually ruled that only those portions of co-defendant Allen's testimony which were non-exculpatory of petitioner Frank could be considered by the jury, and that any exculpatory segments, of which there were many, must be disregarded by the jury and must not be commented upon in summation by petitioner. This deprived Frank of due process by depriving him of a fair trial.

A. The Government successfully argued that it was "unfair" to it to permit any exculpatory matters in the testimony of Allen to be considered by the jurors.

Apparently the Trial Judge and the prosecution thought that it was *ipso facto* unfair to the Government to permit any testimony of Jerome Allen to be considered which might be exculpatory of petitioner Frank. The author of this brief believes that the learned Court and the prosecution were confusing the rule which bars "self-serving" declarations being elicited from one's own witness.

The point that the Trial Court and the prosecution missed is that Frank did not call Allen as Frank's witness. Nor did Frank even examine Allen on direct or cross.

The Government would raise a cry of outrage that would virtually "raise the proverbial roof" if the Trial Court had ruled that any testimony of a witness which inculpated petitioner must be disregarded, but that favorable utterances were all right.

The error of the Trial Court is made obvious by a reading of *Washington v. Texas*, 388 U.S. 14 (1967) which held it to be a denial of a Sixth Amendment right to compulsory process to bar an accomplice from testifying on behalf of a defendant. This Court explained:

> "The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The *absurdity of the rule* is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant. Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing."

This Court continued:

> "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."[9]

This Court further noted that the rule, such as that inexplicably adopted by the Trial Court, increased, rather than decreased the incentive to perjury.

9. Allen had not yet been sentenced when he testified.

Since both Stoller and Frank were joined in trial as co-defendants at the option of the Government, and through no fault of their own, the Government has no right to now "penalize" Frank because Stoller's attorney elicited matter from Allen that was exculpatory of Frank.

The rule below would in essence disqualify a co-defendant from being called to testify in favor of a defendant. For that matter, no testimony favorable to a defendant could ever be elicited by a co-defendant if the ruling below were to stand.

The Trial Court actually ruled (TT3103-3104):

> "THE COURT: . . . You will not be entitled to rely on any exculpatory material that Allen gave in his testimony on direct or cross." (See TT3170.)

The Government confused the learned Trial Judge with nonsense about a "unitary defense" (TT3077).

Milton Gould, an eminent attorney and scholar of the law, sought vainly to correct the incredible error, explaining that when he elicited matter from *Stoller's witness, Allen*, "I didn't become Mr. Frank's lawyer" (TT3083).

The Trial Court concluded the discussions by granting the Government's motion and advising counsel that there could be no consideration of Allen's testimony concerning the fact that he had never given $15,000 to Frank, or of anything else that was exculpatory (TT3098, 3170-3171).

The actual instruction to the jury concerning the disregarding of Allen's testimony was so confusing and vague that it is submitted that the jurors could not help but assume that only the harmful portion of Allen's testimony vis-a-vis Frank could be considered, but that nothing helpful or exculpatory could be regarded as remaining in the case. Thus at TT3170-3171:

> "THE COURT . . . The second thing is that you may recall that during the testimony of Mr. Allen himself on both direct and cross he was asked and gave certain evidence about Mr. Frank, most particularly, as I recall it, in relation to the allegations that Mr. Frank was to receive $15,000 for whatever role he played in the Training With the Pros transactions and certain other evidence about Mr. Frank, as Mr. Allen put it, some of which if not all of which tended to exculpate Mr. Frank.
>
> For *technical reasons* I must instruct you that *all of those questions and answers having to do with Mr. Frank are stricken and must be disregarded by you entirely*. That is the testimony of Allen regarding Frank on both direct and cross is stricken and *must be disregarded by you in deciding this case.*" (Emphasis supplied.)

The veniremen must necessarily have assumed that something dishonest in which Frank was a party had been perpetrated by Allen and probably with the complicity of

Stoller, since his lawyer called Allen and did most of the questioning.

In addition, the jury likely assumed that Frank did receive the $15,000. The prejudice was incalculable. It was an impossible "mental gymnastic" that had to be imposed on the jury *(Bruton v. United States,* 391 U.S. 123). Moreover, Frank was irretrievably prejudiced by an erroneous ruling concerning a situation that was wrought by the co-defendant Stoller's perfectly proper Sixth Amendment right to call a witness.

Moreover, by singling out Frank, the jurors must have assumed that Frank had done something horrendous.

To exacerbate the situation more, the Trial Court denied Frank's request to charge "42" that the jury also disregard the Government's rebuttal testimony attacking Allen's credibility.

Allen testified at great length that the trial prosecutor had threatened him with lengthy incarceration if he failed to be helpful, but with leniency if he cooperated and testified for the Government (TT2575):

> ". . . if I cooperated with you [Sorkin] I would get probably less than two years, and if I didn't you would arrange for consecutive sentencing."

At another point in his testimony, Allen declared that prosecutor Sorkin had been striving to *"get Marty Frank"* (TT2574):

> "On the Coatings case based upon what you told me if I cooperated to *get Marty Frank,* you would let me off easy."

Allen asserted that Sorkin refused to let him call a lawyer when he was brought to the prosecutor's office (TT2596). Further, he related that he was questioned at a time when he had just flown back from Europe and had not slept in three days. In this condition, he was ordered by the prosecutor to explain the "Training With the Pros" case (TT2608).

Mr. Sorkin told Allen that it was important to Allen that the Government win its case against petitioner, otherwise Allen could expect no leniency (TT2609).

As to conversation with his own attorney, Allen was permitted to claim privilege (TT2612).

He said that Sorkin told him that D'Onofrio was going to testify that Allen, Phingst, and Stoller met June 6, 8, 9, and 10 at the Bau au Lac Hotel in Switzerland. When Allen explained that his travel permit did not allow him to be there at that time, and that the dates were impossible, Sorkin nevertheless warned him to conform to D'Onofrio's version (TT2661).

Sorkin also told Allen that D'Onofrio would testify that at a meeting, Frank told him to use nominees (TT2661-2662). Allen's vanity was offended by such a ridiculous situation saying (TT2661):

> "D'Onofrio would swear that he was at a meeting where Marty [Frank] supposedly told me, *an old pro,* to use nominees."

He, Sorkin, also ordered Allen to swear he had seen Government Exhibit 4, the Indication letter, earlier than he actually did. When Allen protested, Sorkin allegedly cautioned him:

> "Jerry, you don't have much choice but to go along with us" (TT2662).

Allen also recalled that the prosecutor ordered him to lie in the Grand Jury (TT2688, 2688a). He also insisted that the Government asked him to entrap Frank (TT2946).

Finally, *Allen denied he had ever paid Frank $15,000* (TT2962).

Under the Trial Court's unbelievable and erroneous ruling, none of the foregoing exculpatory evidence could be considered.

Even assuming *arguendo,* that the Trial Court had a right to strike Allen's testimony with reference to the $15,000 since his taped conversation with Frank was disallowed, which we think is nonsense, the Court had no right to also categorically strike all of the testimony, such as the meeting at Bau au Lac; the fact that Frank did not suggest nominees; the preparation of proof of ownership receipts which Allen denied Frank prepared, and so forth.

It is submitted that in *United States v. Badalamente and Yagid,* docket #74-1517, 1586, at slip opinion, pages 5905 and 5906, the United States Court of Appeals for the Second Circuit had already considered other encounters between Allen and

prosecutor Sorkin. That Court reversed Yagid's conviction because of letters alleging pressure by the Government to force Allen to become an unwilling Government witness.

While Allen was characterized as a liar, cheat and scoundrel by Judge Tyler and Mr. Edwards at Allen's sentencing, there seems to be a consistency in his claims of duress and subornation. At the very least, these remarks and facts of his testimony should have been submitted to the jury and not stricken. By striking them, the jury must have inferred that the Government was being vilified for no reason, and/or that the defendants had coached Allen what to say! But how did Allen know what to say in *Badalamente and Yagid?* That was an earlier case where similar accusations were made. These statements were also against Allen's penal interest since he had not yet been sentenced *(Washington v. Texas, supra.)*

Frank did not take the stand. Allen's testimony represented an oasis of favorable material in a desert of unfavorable or neutral matter. Under *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Trial Court should not have stricken Allen's testimony which was favorable to Frank, as it deprived him of essential material necessary for his defense. The reasoning of that Court striking the testimony is fallacious and incomprehensible.

III.

The petitioner moved timely to dismiss the indictment on the grounds of inordinate delay between the alleged dates of the commission of the crime and the return of the true bill — a hiatus of nearly five (5) years. The record justifies the inference that the delay was purposeful and, moreover, that petitioners' rights under the Fifth and Sixth Amendments were traduced.

A. Such delay in the case at bar was extremely prejudicial because of the fact that the crucial co-conspirator "Bud" Moss died prior to the trial. Such delays not only lull people into a false sense of security, but results in a dulling of memory, the possible discarding or disappearance of documents, and similar prejudicial consequences.

The instant indictment superseded 73 Cr. 1050, which was filed in November of 1973. That indictment charged only Stoller with six counts of making false statements in testimony before the SEC on June 20, 1969. The present indictment was filed in February of 1974 and contained sixteen counts. The latter six counts of the instant indictment are virtually identical to the 1973 indictment.

The present indictment, under which the conviction herein was obtained, declares that the conspiracy commenced "on or about the 1st day of June 1968 . . . " (p.2). The "means" paragraph charges various acts and transactions commencing "prior to June 1, 1968" (p.4), and ending "in May 1969" (p.9). Fourteen overt acts are alleged. The latest of them is said to have taken place "on or about May 21, 1969" (p.10). (See indictment as filed.)

The indictment in the case at bar was filed a mere ninety (90) days before the expiration of the statute of limitations as to the last overt act alleged in the conspiracy count.

We maintain that the delay was not only unnecessary but also was apparently purposeful.

It is clear that the SEC became interested in TWP almost immediately after the last overt act alleged in the present indictment was perpetrated. SEC investigators subpoenaed Mr. Stoller to testify concerning the matter on June 20, 1969, as the indictment itself discloses. Prior to that, on May 27, 1969, the SEC staff took testimony from Elmer H. Moss ("Bud" Moss), the President of TWP. A copy of the transcript of that testimony is annexed to document number 37, which is a motion by Stoller's attorneys dated August 27, 1974, filed with the docket in the Court below.

Moss, unfortunately, died before the trial of this case. The transcript, however, to which we have just adverted, discloses quite forcefully how important his testimony would have been since it contained what we maintain was exculpatory material in a number of important respects.

It is obvious from the transcript of the SEC testimony of Mr. Moss that its investigation partly started because of a spectacular rise in the market price of the TWP stock which took place in the spring of 1969.

Our claim, however, does not rest alone upon the unjustified delay between the SEC investigation in 1969 and the

indictment in 1974. More important is the fact that Ramon D'Onofrio, who was the most important witness against the petitioner in this case, was already acting as a Government agent prior to 1969. He reported to the Government on a regular basis during all periods pertinent to this case.

As this Court will recall, D'Onofrio is named as an unindicted co-conspirator in this case (Indictment, p. 12). It is alleged that D'Onofrio owned an account at a Swiss bank which was used in connection with the transactions herein alleged, such account having the code name "Gypsy."

It is alleged that D'Onofrio met with Moss in the spring of 1968 to arrange a public offering of the common stock of TWP.

According to the indictment, D'Onofrio was instrumental in all of the subsequent movements of the stock of TWP directly involved herein. He is, in fact, claimed to have "assigned" 4,900 shares to five nominees (Indictment, p.6).

D'Onofrio was engaged in a number of other transactions essential to the prosecution of this case, as is set forth in the indictment.

This is disclosed in the cases of *United States v. Pfingst,* 477 F.2d 177 (2 Cir. 1973), *cert. denied,* 412 U.S. 941 (1973) ["Pfingst I"]; and *United States v. Pfingst,* 490 F.2d 262 (2 Cir. 1973) ["Pfingst II"]. The opinion of the Court of Appeals in the Second Circuit in *"Pfingst I"* reveals that D'Onofrio began to cooperate with the Government and met with an F.B.I. agent for this purpose on July 17, 1970 (p.194). The opinion in *"Pfingst*

II" exposes some of the relationship between D'Onofrio and the Government in more detail. It is there revealed that various negotiations took place between D'Onofrio and the Government concerning evidence to be given by D'Onofrio and undertakings by the Government that he would not be prosecuted on certain charges.

The Government's brief filed in opposition to pretrial motions in the case at bar expressly concedes that "D'Onofrio was cooperating with the Government as early as 1970 . . . " (pp.19-20).

According to the affidavit of Milton Gould in the August 27, 1974 motion previously referred to (Document No. 37), he states unequivocally that:

> "in addition, documentary information has come to our attention indicating that D'Onofrio was working as a Government agent or informer for some years prior to 1970, beginning perhaps as early as 1964." (p.5).

Motions were made originally to dismiss the indictment, predicated in part on the fact that E.H. Moss, President of TWP, had become seriously ill. A further motion was made when E.H. Moss died, thereby making the prejudice irrevocable and dramatic.

The August 27th affidavit of Milton Gould previously referred to (Document No. 37), sets forth a number of areas wherein Moss would have given exculpatory testimony (*e.g.*):

> "The loss of Mr. E.H. Moss is perhaps even more important. It is unnecessary to speculate what Mr. Moss would have said had he lived and had he been called as a defense witness. This is because he testified at some lenght concerning the public offering of TWP stock before the SEC on May 27, 1969. A copy of the transcript of his testimony was filed with the Court in connection with the said motion. It will be seen that Mr. Moss flatly contradicted certain important facts alleged in the indictment and seriously undercut other allegations."[10]

Although the indictment alleges that D'Onofrio met with Moss on several occasions to discuss the underwriting of an issue of TWP common stock, Mr. Moss testified that he "never discussed" with D'Onofrio a proposed public offering of TWP stock at any time prior to the effective date of the offering (TT 9-10).

The indictment accuses that D'Onofrio, Stoller and Allen agreed to obtain a substantial portion of the issue, and then "assign" various shares to nominees. Moss' testimony would have tended to refute this. He testified before the SEC that he had five people to help in the public offering of the TWP stock (TT6); he named the five people; they did not include D'Onofrio, Stoller and Allen (TT6-7). Indeed, Mr. Moss said he did not think D'Onofrio had ever purchased any stock of TWP (TT43).

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10. Under *Anderson v. United States*, 417 U.S. 211, Moss' testimony was admissible, not for its truth, but to show that no conspiracy existed. See, too, *Lutwak v. United States*, 344 U.S. 604.

The indictment alleges that nearly all of the 42,000 shares issued in the public offering were controlled by Stoller, Allen and D'Onofrio or were purchased by their friends and associates. Moss, however, testified that of the 130 subscribers, 61 subscribed as a result of "independent" letters of inquiry, having no connection with the people helping him in the public offering (TT17-18).

The indictment also alleges an effort to cause the market price of TWP stock to go up by getting brokers to recommend its purchase. Moss explained the rise in the price of the stock in 1969, however, by reference to potential lucrative contracts between TWP and major industrial corporations and by reference to important publicity TWP received in various journals and trade publications (TT36-37). Citing this publicity, Moss said, "That's the only reason I can give you for the stock going to this price" (TT37).

The Government has had the means of prosecuting this action for years. This is not only because of the extensive evidence gathered by the SEC in its 1969 investigation. It is also because D'Onofrio has been cooperating with the Government since at least July 17, 1970. This was revealed in the course of another trial at which D'Onofrio was a principal Government witness. See *United States v. Pfingst,* 477 F.2d 177, 194 (2d Cir. 1973), *cert. denied,* 412 U.S. 941 (1973). It is believed that D'Onofrio was actually a Government informer or agent for some years prior to that. The Government's own brief in opposition to the earlier pre-trial motions herein expressly conceded that "D'Onofrio was cooperating with the Government as early as 1970 . . . " (pp.19-20).

It should also be noted that among the most important allegations in the indictment are claims that defendants Stoller and Frank had various meetings with defendant Allen and co-conspirator D'Onofrio. It is at these meetings that the conspiracy was allegedly hatched and that the details were agreed upon, according to the indictment.

The Government, however, because of its own delay, has been unable to state the dates when these meetings took place, thus preventing the defense from gathering evidence contradicting the Government's claims.

The defense, for example, was precluded from proving that an alleged meeting could not have taken place at the time claimed because Stoller was out of town.

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (*Regina v. Robbins,* 1 Cox. C. C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? . . . [I]f the charge be not preferred for a year or more, how can he clear himself? *No man's life would be safe if such a prosecution were permitted.* It would be very unjust to put him on his trial." (Emphasis supplied.)

See, 5 Stan. L. Rev. 95, 104, 1952, *Justice Overdue — Speedy Trial for the Pre-Trial Defendant.*

In *Mann v. United States,* 304 F.2d 394, 396-397 (D.C. Cir. 1962), the Court similarly noted:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. *With no knowledge that the criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime."* (Emphasis supplied.)

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In *Pollard v. United States,* 352 U.S. 354, 361-362 (1957), this Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted *United States v. Provoo,* 350 U.S. 857 (1955), *affirming Petition of Provoo,* D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from *Pollard v. United States, supra,* 352 U.S. at 361, that this Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. [See *Mann v. United States, supra,* 304 F.2d at 396-397, n. 4; *Taylor v. United States,* 238 F.2d 259

(D.C. Cir. 1956); *Nickens v. United States,* 323 F.2d 807 (D.C. Cir. 1963); *United States v. Provoo, supra.*] See 18 U.S.C. §3282.

In *Provoo,* as in *Taylor,* delay before trial was one of the combination of factors, which, in sum, affected a denial of the right to a speedy trial. The importance of this factor to the decision in *Taylor* was emphasized in *James v. United States,* 261 F.2d 381 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 930 (1959). The delay in the case at Bar occurred between the alleged commission of the offense and the finding of an indictment, rather than between complaint and indictment or indictment and trial *(cf.* Rule 48(b) F. R. Crim. P.). The delay which occurred herein, is just as prejudicial and serious as any other delay, and clearly should not be immunized from the mandates of the Fifth or Sixth Amendments.

See, *Ross v. United States,* 349 F.2d 210 (D.C. Cir. 1965). In *Ross,* the Court of Appeals (249 F.2d at 211), proclaimed:

> ". . . We think a record of this kind *more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue,* centering around Appellant's ability to defend himself."

In *Ross,* the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in *Ross v. United States, supra,* the Court was not merely articulating its supervisory power over district courts in Washington, D.C.

See also, *Barker v. Wingo,* 407 U.S. 514, 531, 533; *Dickey v. Florida,* 398 U.S. 30, 37-38; *Hodges v. United States,* 408 F.2d 543, 551 (8 Cir. 1969).

Since *United States v. Marion,* 404 U.S. 307 (1971), it has become obvious that an indictment may be dismissed notwithstanding the fact that the statute of limitations has not run on the crime.

In *United States v. Marion,* 404 U.S. 307 (1971), the Court said (p. 324),

> ". . . it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment."

The Court said that there can be circumstances in which, as a matter of Fifth Amendment due process, "actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution" (p. 324).

IV.

Petitioner was acquitted of all of the substantive counts and convicted only of conspiracy. Since each substantive count referred to the conspiracy, we submit that this Court, in its supervisory powers over federal tribunals, should overturn the conviction and rule that under these circumstances no conviction can stand.

Petitioner was indicted under ten counts of a multi-count indictment. Counts 2 through 10 were the so-called substantive charges, of which Frank was acquitted. Count 1 was the conspiracy allegation.

It is obvious from a perusal of the indictment, which was presented to the jury, that each substantive count, that is 2 through 10 inclusive, necessarily depended upon paragraph "5" of the conspiracy count, Count 1, which paragraph was incorporated fully into each of the substantive acts alleged. Thus, in each of the counts, 2 through 10, the following is set forth in the indictment:

> "The allegations contained in paragraph 5 of count one of this indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which the defendants committed the offense charged in paragraph 1 of this count."

The foregoing is a quotation with respect to Count 2, but the same quotation exists with respect to Counts 3 through 10 inclusive as well.

In addition, a perusal of Counts 2 through 10 inclusive makes it manifest that the mutual cooperation of at least two persons is absolutely essential to establish the proof necessary to convict of any of the substantive Counts 2 through 10.

When petitioner Frank refers to conspiratorial activity with respect to the substantive charges 2 through 10, what we are actually maintaining is that necessarily two or more persons were engaged in, and necessarily had to be involved in the activities which were the subject matter of the respective substantive counts hereinbefore alluded to.

This Court has supervisory powers over federal tribunals. (*McNabb v. United States,* 318 U.S. 332, and *Mesarosh v. United States,* 352 U.S. 1.)

While we recognize that Wharton's "Rule" is not technically applicable (*Ianelli v. United States,* 43 U.S.L.W. 4423 [decided March 25, 1975], we nevertheless urge that fundamental fairness requires the vacating of the conviction herein (*cf., Ker v. California,* 374 U.S. 23).

A perusal of the indictment and of the record reveals that all of the activities in the substantive counts also necessarily embrace part or all of the conspiracy charge.

The disfavor expressed by this Court for attempts "to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions", should sway this Court to strike down the superfluous conspiracy count in the present indictment. *Grunewald v. United States,* 353 U.S. 391, 404 (1957). *See Krulewitch v. United States,* 336 U.S. 440 (1949).

The prejudice generated by the prosecution's ill-advised addition of the conspiracy charge is very real. In addition to added punishment via fines and imprisonment, the conspiracy addendum opens the floodgates for hearsay evidence at trial. The Government extensively uses various means to gather statements by various participants in the alleged transgression of law. We have seen in the case at bar what lengths the Government went to get statements or at least some conversations between Allen and Frank by setting up a "straw man" in the figure of Allen to coax and cajole and entice Frank into having a conversation with him concerning the case.

Thus, evidence ordinarily receivable only against a particular individual, is made binding upon all of the alleged co-conspirators by virtue of the inclusion of a conspiracy count.[11]

In *Krulewitch v. United States, supra,* Justice Jackson, after a survey and criticism of the federal law of conspiracy declared (336 U.S. at 457):

11. See *Developments in the Law — Criminal Conspiracy,* 72 Har. L. Rev. 920, 923 (1959), where one legal commentator has addressed himself to this very problem:

> "By means of evidence inadmissible under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in conviction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."

See also *United States v. Falcone,* 109 F.2d 579, 581 (2d Cir. 1940), *aff'd,* 311 U.S. 205 (1940); Note, *The Conspiracy Dilemma; Prosecution of Group Crime or Protection of Individual Defendants,* 52 Harv. L. Rev. 276, 277 (1948).

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evil doers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges . . . and I think there should be no straining to uphold any conspiracy conviction where [as herein] the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In *Glasser v. United States,* 315 U.S. 60, 75, 76 (1942), this Court explained:

> "In conspiracy cases . . . liberal rules of evidence and wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant . . . . "

As a practical matter, the jury does not distinguish between the separate defendants' cases when conspiracy has been charged. The indiscriminating jury deliberations in cases like these are the real motivation for the adding of a separate conspiracy charge to a substantive crime which includes conspiracy as one of its elements. This Court is thus given another opportunity to express its displeasure and disagreement with this ever-mushrooming prosecutorial practice. Prosecutors must be told, once and for all, that our system of criminal justice does not tolerate such unfair tactics.

There is no question but that the use of a conspiracy count permitted the introduction of evidence otherwise inadmissible.

In *United States v. Falcone,* 109 F.2d 579 (2 Cir. 1940), *aff'd.,* 311 U.S. 205 (1940), Judge Learned Hand of the Court below aptly declared (*id.* 581):

> " . . . Today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders . . . there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

In view of the foregoing, we ask this Court to take this opportunity to set new guidelines for conspiracy cases. In a case such as the one at Bar where the substantive counts embraced all or portions of the conspiracy charge, we submit that an acquittal of the substantive counts should require an automatic rejection of the conspiracy count.

V.

The petitioner had demanded "Brady" and 3500 material from the prosecution, particularly concerning the main witness, D'Onofrio. It was conceded during the argument in the Court below that D'Onofrio's sentence minutes refer to a confidential Government memorandum which was ordered sealed and returned to the prosecution. This memorandum was acknowledged to be "Brady" material. This Court should review that sentencing memorandum and determine whether the courts below violated Frank's rights of confrontation and fundamental fairness by not supplying it to him for use in cross-examination.

To point to the witness D'Onofrio as the main Government witness would no doubt meet with no challenge from the prosecution. The Government conceded that D'Onofrio had been cooperating with the Government since 1970. That he was a liar, cheat and thief is borne out by the statements of the witness himself as well as Government 3500 material supplied.

In the district court, counsel for Stoller, in an affidavit, declared that documentary evidence had been acquired showing that D'Onofrio had been cooperating with the Government for at least a half dozen years prior to 1970, that is, as early as 1964. This was not revealed by the prosecution and no opportunity to confront him on any such material was afforded.

At his sentencing on November 8, 1974 before Judge Brieant (72 Cr. 884, 1221; 73 Cr. 192, 654), the Court acknowledges receipt of a confidential sentencing memorandum from the Government which it ordered sealed and returned to

the prosecution. The Court noted that the memorandum probably contained valuable 3500 material!

Petitioner Frank's appellate counsel specifically asked to be permitted to see the sentence memorandum on the D'Onofrio sentence, but the trial prosecutor, Mr. Sorkin, categorically refused to do so citing, *inter alia,* that D'Onofrio's life might thereby be jeopardized.

We now ask this Court to direct that the sentencing memorandum of D'Onofrio be handed up to this Court *in camera,* so that it can at least determine if matters are therein contained with which D'Onofrio might have been confronted as 3500 or *Brady* material.

The colloquy supporting petitioner's charge is set forth in the sentencing minutes of D'Onofrio, *e.g.,* (p.7):

"The Court: A paymaster among thieves. That's Judge Desmond's expression of what I am charged with today. I want to make it very clear to you that except for your cooperation I'm prepared to impose a very substantial sentence on you, but I must and will give great consideration to the fact that you stood up and testified and abjured cross-examination and your testimony stood up and you were instrumental in giving up a Supreme Court Justice who was a crook. You were instrumental in a conviction before Judge Tyler. You have done other work in the public interest, which is disclosed in the memoranda but

which I really think ought not to be publicly stated.

The Defendant: I prefer not also, your Honor.

The Court: *I think these memoranda might very well be sealed or withdrawn by the Government."*

The sentencing minutes of D'Onofrio, further corroborating our accusations reveal on pages 12 and 13 thereof:

"Mr. Mogul: Yes, your Honor. Your Honor, as to the matter of the sentencing memorandum submitted by the Government, my application would be as follows: That all memoranda be returned to the Government. I think that would be the most secure —

The Court: I think that is reasonable. Frankly, these memoranda present a difficulty. *I often wonder whether they would constitute 3500 material or Brady material if you tried to use this man as a witness in some other case.* So I'll physically return the sentencing memorandum to the United States Attorney's Office. So the record may be clear what they are, I am going to mark them as Court's Exhibit 1 and 2 for identification, in this proceeding.

Mr. Mogul: Your Honor, there is one more matter in this case —

The Court: Exhibit tags are not to be removed."

At trial the Government never conceded that D'Onofrio had been promised 18 months to be served at Egland Air Force Base in Florida as a reward for cooperation. A witness testified that D'Onofrio had bragged about this before his sentence (see testimony of Melvin Hiller).

Pages 8 and 11 of the said sentencing minutes, however, disclose that D'Onofrio was in fact sentenced to 18 months at Egland, and was fined, but that the fine was *not* a committed fine.

We have already referred to the ***Badalamente and Yagid*** case, *supra.* The letter of Jerome Allen which referred to great pressure and threats by the same prosecutor who handled the case at bar, was held by this Court to be 3500 material, and since the credibility of Allen was most vital, the Court of Appeals for the Second Circuit declared that the non-disclosure of that letter was reversible error (*Badalamente,* slip op., pp. 5908-5909).

"We have no doubt that the letter to the trial judge and the letters to other Government officials were Jencks Act material, that they had a direct bearing on the persuasiveness of Allen's testimony, and that their nonproduction was reversible error warranting the reversal of Yagid's conviction and the award of a new trial. *United States v. Sperling,* F.2d (Nos. 72-2363,

et al., 2 Cir., October 10, 1974). *United States v. Pacelli,* 491 F.2d 1108, 1119 (2 Cir. 1973);[12] *United States v. Pfingst,* 477 F.2d 177, 194-95 (2 Cir. 1973); *United States v. Polisi,* 416 F.2d 573, 577-79 (2 Cir. 1969). See also *United States v. Mayersohn,* 452 F.2d 521 (2 Cir. 1971). Although the prejudicial failure to produce the material in accordance with 18 U.S.C. §3500 is enough to require reversal and a new trial, we think that as the trial continued after Yagid testified — where his testimony made the credibility of Allen crucial to the determination of Yagid's guilt or innocence — the nonproduction of the Allen letter to the trial judge and the Allen letters to other public officials was a violation of the rule in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), that 'the suppression by the prosecution of evidence favorable to an accused upon request

12. "*United States v. Sperling* and *United States v. Pacelli* are of special interest because both involved the non-production of letters, in the possession of the prosecutor, written to public officials by significant government witnesses. Both cases hold the non-production of a violation of 18 U.S.C. §3500. In *Pacelli,* the conviction of the single appellant was reversed and a new trial awarded. In *Sperling,* upon an analysis of the prejudicial effect of non-production in the light of the other evidence in the case, the convictions of some appellants were reversed while others were affirmed on the harmless error doctrine. In the instant case, we think, as developed in the text, that reversal is ineluctable. The stand-off between the testimony of Olsberg, an impeachable witness, and Yagid, also impeachable, may well have been resolved only by the testimony of Allen whose credibility may have been subject to further serious attack."

> violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution'."

Since D'Onofrio in the case at bar, is certainly as important as Allen was in the *Badalamente* case, and his credibility is paramount, we submit that if there is anything in the sealed and suppressed report on D'Onofrio which was shown to Judge Brieant that could be helpful or exculpatory to Frank, then it should be divulged and the conviction ought to be reversed.

As was said in the argument in *Kolod v. United States,* 390 U.S. 136, 138 *ex parte* determinations of what should be divulged are impermissible. The argument noted:

> "When a government winces at full disclosure in cases such as this, it is a government that has lost its taste for freedom."

See also, *Alderman v. United States,* 394 U.S. 165.

VI.

During the trial the prosecution shifted its theory as alleged in the indictment from that of fraudulent manipulation to undisclosed underwriters. This deprived petitioner of due process of law since it deprived him of the right to be tried only upon charges presented in the indictment.

During the course of the trial the Government shifted its theory of prosecution from that of fraudulent manipulation of TWP stock to that of undisclosed underwriters.

We have already adverted to this dichotomy of theory.

It is submitted that a person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. (*Stirone v. United States,* 361 U.S. 212, wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon the charges presented in the instrument.)

A change in the indictment deprives the Court of the power to try the accused altogether (*Ex Parte Bain,* 121 U.S. 1, 12).

Under these circumstances we submit that error was also committed requiring review by this Court and ultimate reversal.

VII.

We adopt all of the other arguments made in the Court below and ask this Court to deem them incorporated by reference.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 1122—September Term, 1974.

(Argued May 15, 1975 Decided June 27, 1975)

Docket No. 74-2639

UNITED STATES OF AMERICA,

Appellee,

v.

MARTIN FRANK,

Appellant.

Before:

Smith and Oakes, *Circuit Judges,*
and Jameson, *District Judge.**

Appellant was convicted by a jury in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* of conspiracy to violate the federal security laws, 18 U.S.C. §371. Appellant claims that (1) his acquittal on the substantive counts of securities fraud and mail fraud precluded conviction of conspiracy; (2) his Sixth Amendment rights were violated by post-indictment conduct by the Government; (3) the Government suppressed exculpatory evidence; (4) pre-indictment delay violated his right to a fair trial and (5) the Government's summation and the court's charge were improper.

Held, Judgment of conviction affirmed.

* Of the District of Montana, sitting by designation.

Opinion

IRVING ANOLIK, New York, N.Y., *for Appellant.*

IRA LEE SORKIN, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, John P. Flannery, Jr., Lawrence S. Feld, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

The "Go-Go" stock market of the late 1960's produced a wide variety of stock frauds reminiscent of the pre-SEC 1920's, with one of the more common schemes involving market price manipulation upon a company's "going public." The stock, preferably one with a salable or "glamorous" name, would originally be issued to insiders, with only a limited number of shares issued (a "thin float"). The price of the stock would then be manipulated by trading back and forth among the insiders, with the limited number of shares available for trading making it reasonably easy to control the market. Additional pressure might then be exerted upon the market by touting the stock in market newsletters and by approaching "friendly" brokers with favorable reports about the company. Ultimately the insiders would sell their initial investment, plus what they purchased in the "after market," at big profits to an unsuspecting public or to individual dupes who were left holding worthless paper when the bubble burst and the stock leveled out at a true value.

Opinion

This appeal, involving just such a factual setting, is by Martin Frank, a lawyer specializing in SEC matters, from a conviction by a jury in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* for having conspired, 18 U.S.C. § 371, to violate the federal securities laws in connection with the initial public offering of Training with the Pros (TWP).[1] His coconspirators included two New York stock manipulators, Stoller and Allen, who were "financial consultants" and ran a market "survey," and one Herbert, an employee of the Swiss Bank Hofmann. That bank apparently lent itself to manipulations, not only by supplying the usual "numbered" anonymous or code-name accounts the secrecy of which was safeguarded under Swiss law, but also by buying and selling speculative American stocks for its own and its customers' accounts. Appellant's services to the conspiracy were essentially in his capacity as a lawyer, giving advice to the conspirators (who also included the ubiquitously criminal Ramon D'Onofrio)[2] as to how best to conceal their TWP manipulation and how best to avoid, first, SEC investigation and, second, after investigation commenced, SEC uncovering of that illegal manipulation. These services were for a consideration of $15,000 cash (paid into Frank's own "Erika" account at Bank Hofmann) and 1,000 shares of TWP also to be there deposited.

Coconspirator Allen pleaded guilty to the conspiracy count (along with some other indictments) and was called as a defense witness, of which more later. D'Onofrio, when

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1 Training with the Pros (formerly M & H Studios, Inc.) was a small company engaged in the business of promoting sales training programs.

2 *United States* v. *Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Pfingst*, 477 F.2d 177, 191-92 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). *See United States* v. *Persky*, No. 75-1108 (2d Cir. June 18, 1975), slip op. 4091, 4095.

he finally traded his fugitive status in 1973 for certain prosecution protection, testified for the prosecution as has become his wont, note 2 *supra*. Stoller was convicted on all 12 counts that went to the jury, four false statement counts against him having been dismissed at the close of the Government's case. Appellant was acquitted on nine substantive counts, essentially relating to fraud in the offer and sale and in the purchase and sale of securities and mail fraud. For his conviction on the conspiracy count, however, he received a two-year jail sentence and $2,500 fine. We affirm.

With the exception of the Swiss bank participation in the scheme and evidence of assorted threats to lives of certain participants or dupes when the scheme began to fall apart apparently as the result of an anonymous letter to the SEC, the tawdry facts are so typical of crookedness over-the-counter that they are unnecessary to detail here, at least where appellant contests sufficiency of the evidence, if at all, only en passant. There is in any event no substance to a sufficiency argument.

In February or March of 1968, D'Onofrio, Stoller, Allen and Joseph Pfingst met in Zurich, Switzerland, and agreed to a scheme whereby they would help to underwrite an offering of 40,000 to 50,000 shares in TWP. Under the plan, the coconspirators were to receive 25,000 shares on the date of the offering for $6-$7 per share. They would then manipulate the stock price to $50-$60 a share at which point they would "blow off" or sell the shares to Stoller and Allen's customers, Bonavia and Weissinger, who had accounts at Bank Hofmann that were controlled by Stoller. It was further agreed initially that Herbert, a Bank Hofmann employee, would have the bank send an "indication letter" to TWP expressing a willingness to purchase 25,000 shares of stock on the offering date.

It was at this point that appellant Frank became involved in this conspiracy. D'Onofrio's lawyer-partner Joseph Pfingst[3] had drafted an "indication letter" which stupidly[4] carried a date prior to the filing of the Regulation A notification for TWP, *i.e.*, prior to TWP's signifying any intention of going public. Reviewing this letter Frank immediately recognized that legally no one could "indicate" for an issue as to which the company had not yet filed its SEC notification. He thereby took control of the legal aspects of the scheme explaining to his coconspirators "how to do the deal without getting caught."

His explanation included taking only 15,000 shares, so as not to alert the SEC, using friendly nominees (guaranteed a small profit) at 1,000 shares each as vehicles to take that 15,000, obtaining a bill of sale verifying a sale to Bank Hofmann, and drawing checks on a New York bank showing a profit for federal tax purposes. Subsequently Frank gave more advice to the conspirators to throw the SEC off the scent, *i.e.*, to have more than 100 people own stock in TWP with some of them unfamiliar with the three key conspirators. He also helped with the mechanics, assembling the nominees' certificates, obtaining bills of sale from the nominees, guaranteeing signatures, preparing and notarizing some of the bills of sale so as to ease transfer of the stock from the nominees into the "street name" of a brokerage house which handled Bank Hofmann's American accounts, thereby facilitating the "blow-off" to Stoller and Allen's two clients' accounts at that pillar of a Swiss bank. When the SEC began to pursue the TWP trail, Frank told D'Onofrio to talk to his friend

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3 *See* note 2 *supra*. Pfingst apparently left the TWP deal when he became a state judge.

4 Pfingst and D'Onofrio were following the pattern of an earlier "deal," but one in which the issue was already public.

Moss, the president of TWP, to make sure that Frank's firm would represent TWP "so I can protect us." In connection with an SEC investigation, Frank told Stoller who thought he could fool "those dumb bastards at the SEC" that he should have taken the Fifth Amendment rather than to have testified perjuriously. Frank also told Bonavia, Stoller's "client" who had been unwittingly stuck with 9,100 of the conspirators' shares of TWP at the "blow-off" price of $450,000, that he should "take the Fifth," "not to involve us in any Swiss bank accounts," not to mention TWP, and Bonavia complied.[5] Frank wanted to be sure to "get stock this time," especially if it were "going to be a hot number." When considerable time had passed—the events above occurred in 1968 and 1969 and by late 1972 or early 1973 Frank still had not received his 1,000 shares —he went to Switzerland and complained to Stoller and Herbert, threatening the latter's bank with "a hell of a lot of problems from me." Frank, in short, was no mere "casual facilitator," *United States* v. *Hysohion,* 448 F.2d 343, 347 (2d Cir. 1971), but gave advice and performed acts knowing that they would be used to violate the federal securities laws. *See United States* v. *Tramunti,* No. 74-1550 (2d Cir. Mar. 7, 1975), slip op. 2107, 2144.

His argument that his acquittal on the substantive counts precludes conviction on the conspiracy count carries no impact either as a contention of inconsistency of verdict, *Dunn* v. *United States,* 284 U.S. 390 (1932); *United States* v. *Zane,* 495 F.2d 683, 690 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974), or as a violation of Wharton's "rule," the doctrine (now applicable only as a judicial presumption) that when there is no ingredient in

5 Bonavia was somewhat vulnerable to Stoller's and Frank's importunations as his own past dealings at Bank Hofmann with Stoller had left him so. Stoller also threatened Bonavia that D'Onofrio would "have him taken care of."

the conspiracy which is not present in the substantive crime, *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946), as in the case of bribery, *United States* v. *Sager,* 49 F.2d 725 (2d Cir. 1931), there can be no conviction for conspiracy. *United States* v. *Zeuli,* 137 F.2d 845 (2d Cir. 1943). Here, of course, the conspiracy involved more persons than were required for the commission of any of the substantive offenses. *Ianelli* v. *United States,* 43 U.S.L.W. 4423, 4425 (U.S. Mar. 25, 1975); *United States* v. *Fino,* 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974); *United States* v. *Benter,* 457 F.2d 1174, 1178 (2d Cir.), *cert. denied,* 409 U.S. 842 (1972).

Appellant's principal point is that the Government infringed his Sixth Amendment rights to counsel as explicated in *Massiah* v. *United States,* 377 U.S. 201 (1964), by inducing the then cooperating defendant Allen to tape conversations with Frank, who had been attempting to have Allen sign an affidavit exonerating him and denying payment of $15,000 to Frank in connection with the TWP stock deal. While the Government's action was taken after the first indictment had been filed in this case, 74 Cr. 159, Allen was directed to limit his conversation to matters involving perjury and obstruction of justice—matters which eventually led to the filing of a superseding indictment, 74 Cr. 763. While the tapes might possibly have been admitted solely with respect to the charges in that subsequent indictment, *cf. Hoffa* v. *United States,* 385 U.S. 293, 309-10 (1966); *United States* v. *Poeta,* 455 F.2d 117, 122 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972), Judge Tyler, ruling safely, *excluded* the tapes because one of them "drips with culpability" on the part of Frank on the main charge here under consideration.[6] Indefatigably, Frank claims, how-

6 The indictment for suborning perjury and obstructing justice had been consolidated for trial with that in the instant trial but when the tapes were excluded was dismissed at the close of the Government's

ever, that he was prevented from taking the stand on his own behalf, because he knew the tapes could be used against him for impeachment purposes under *Harris* v. *New York,* 401 U.S. 222 (1971). This point is not timely since it was first raised in a Rule 29 motion after trial, but, more importantly, as *Harris* holds, in a *Miranda* context to be sure, a person cannot affirmatively resort to perjurious testimony and avoid impeachment by evidence however obtained. The *Massiah* context here, at least in the light of the Government's good faith effort not to violate appellant's Sixth Amendment rights, does not differentiate this case. We cannot feel overly sympathetic to the novel argument that a defendant was prevented from furnishing perjurious testimony by the existence of this evidence in Government hands.

Frank's next major contention deserves no more than summary treatment. When Allen was called as a witness after the tapes were made, it was as a witness for Stoller. Allen then proceeded, after denying most of the prosecution's evidence in chief, to perjure himself at some length by testifying that Frank had not been paid $15,000 for telling the conspirators how to run the TWP deal,[7] but rather—as Frank had attempted to have him say—that Allen was paying back a loan to an Al Brodkin. Confronted with a transcript of the lie-giving tapes, Allen then decided to exercise his Fifth Amendment rights. Judge Tyler properly ruled that all of Allen's testimony

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case. The phrase "drips with culpability," it can be said now that Judge Tyler has left the bench for other work, is what is typically called at Foley Square a "Tyler-ism," which is a colorfully pungent, all-too-accurate avoidance of euphemism.

7 Frank himself had said on the tape (GX 101B): "There's no question in my mind, and I know there is none in yours, that you paid me $15,000 for telling you how to do the training deal. There is no question in my mind. I had to tell you and Ray and Jerry [Frank meant Stoller, Phil"].

regarding Frank be stricken, to protect the court itself against fraud—explained to the jury as for "technical reasons." The only viable alternative for the court was to permit cross-examination by the Government on the basis of the theretofore inadmissible tapes. In the light of the *Massiah* claim and the fact that Allen was called as Stoller's and not Frank's witness, permitting such cross-examination would have carried substantial mistrial risks.

We need not rest on the trial court's ground for striking the Allen testimony, although the powers of a court to prevent intrinsic fraud on it are very great indeed. *Cf. Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U.S. 238 (1944). *See Tehan* v. *Shott,* 382 U.S. 406, 416 (1966) ("the basic purpose of a trial is the determination of truth"). Rather, by virtue of Allen's refusing to answer (for whatever reason) proper, relevant questions on cross-examination going directly to the heart of his testimony on direct examination, the direct testimony became hearsay, since not subject to cross-examination, and was therefore properly struck. *Cf. United States* v. *Cardillo,* 316 F.2d 606, 611 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963); 5 Wigmore on Evidence § 1362 and § 1391 (1972 pocket supp.) at 29. *See also Smith* v. *Illinois,* 390 U.S. 129 (1968).[8] In this situation the Government is surely entitled to the protection of a similar rule against admissibility of non-collateral testimony not subject to cross-examination as is a defendant.

Frank also argues that his rights to a fair trial under the Fifth and Sixth Amendments were prejudiced by the four-year eight-month delay between the end of the conspiracy (June, 1969) and indictment (February 1, 1974).

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8 We need express no opinion on whether by testifying in direct Allen waived his Fifth Amendment privilege, *Brown* v. *United States,* 356 U.S. 148 (1958), or on what would have been the situation if the direct testimony had been on a collateral matter.

But factually, the key testimony of D'Onofrio was not available to the Government until his waiver of extradition from England in May, 1973,[9] and, legally, we are bound by *United States* v. *Marion,* 404 U.S. 307 (1971), since here there was neither prosecutorial misconduct nor actual prejudice. *See United States* v. *Brown,* No. 74-1947 (2d Cir. Feb. 20, 1975), slip op. 1847, 1850-51. On the question of prejudice, while Moss, the president of TWP, died on July 2, 1974, Frank was aware of his illness and could have deposed him, Fed. R. Crim. P. 15 and 18 U.S.C. § 3503. *United States* v. *Schwartz,* 464 F.2d 499, 505 (2d Cir.), *cert. denied,* 409 U.S. 1009 (1972). And Frank was not pressing for trial. *United States* v. *Stein,* 456 F.2d 844, 849-50 (2d Cir.), *cert. denied,* 408 U.S. 922 (1972).

Frank makes essentially the same claim previously made by Pfingst, *United States* v. *Pfingst,* 490 F.2d at 262, that the Government probably suppressed § 3500 material regarding D'Onofrio. He made no such claim at trial, did not cross-examine D'Onofrio about it and fails to call our attention to any of that material not disclosed in the 33 documents delivered to counsel at trial or in the *Pfingst* records, note 2 *supra.* We have examined in camera the D'Onofrio sentencing memoranda given Judge Brieant and see no Jencks Act or *Brady* material (*Brady* v. *Maryland,* 373 U.S. 83 (1963)) not already disclosed to appellant.

Appellant's only other point worthy of discussion is that the Government summation and the court's charge prejudicially altered the Government's theory of the case.

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9 While D'Onofrio had earlier cooperated with the Government to testify against Pfingst, note 2 *supra,* when questioned in Pfingst's bribery trial about his bank account, "Egypt," involved in the TWP fraud, he invoked his Fifth Amendment privilege, spent 22 days in jail for contempt, was fined $10,000 and became a fugitive. *United States* v. *Pfingst,* 490 F.2d at 269.

Frank argues that he was surprised by the Government's claim under Count Two[10] that the conspirators had omitted material facts, especially that they were underwriters, while they had defended against a charge of improper manipulation. Even were this so (and nothing in Count Two indicates it to be), Frank was acquitted on that count and the conspiracy count covered three objects, fraud in the offer and sale of TWP stock (Count Two), fraud in the purchase and sale (Counts Three-Six), and use of the mails to defraud. Evidence of accomplishment of one of the objectives of a conspiracy is enough to support the conspiracy conviction. *United States* v. *Papadakis,* 510 F.2d 287, 297 (2d Cir. 1975); *United States* v. *Mack,* 112 F.2d 290, 291 (2d Cir. 1940).

Appellant's remaining claims as to the court's charge, the denial of a severance of counts relating to Stoller's false statements to the SEC (*cf. United States* v. *Carson,* 464 F.2d 424, 436 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972)), and as to jurisdiction are in the first two instances without merit and in the last one frivolous.

Judgment affirmed.

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10 A count charging a violation of Section 17 of the Securities Act, 15 U.S.C. § 77q:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of June, one thousand nine hundred and seventy-five.

Present:

Hon. J. Joseph Smith, Circuit Judge

Hon. James L. Oakes, Circuit Judge

Hon. William J. Jameson, District Judge.

Docket No. 74-2664

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MARTIN FRANK,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of September, one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH, CIRCUIT JUDGE

HON. JAMES L. OAKES, CIRCUIT JUDGE

HON. WILLIAM J. JAMESON, DISTRICT JUDGE

Circuit Judges.

74-2639
74-2664

United States of America,

Plaintiff-Appellee,

v.

Martin Frank,

Defendant-Appellant.

Order Denying Rehearing

A petition for a rehearing having been filed herein by counsel for the appellant, Martin Frank

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

ORDER DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of September, one thousand nine hundred and seventy-five.

74-2639
74-2664

United States of America,

Plaintiff-Appellee,

v.

Martin Frank,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Martin Frank, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

ORDER EXTENDING PETITIONER'S TIME

SUPREME COURT OF THE UNITED STATES

No. A-253

MARTIN FRANK,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 30, 1975.

s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 19th day of September, 1975.

No. 75-640

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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No. 75-640

MARTIN FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on June 27, 1975, and a petition for rehearing and suggestion for rehearing *en banc* were denied on September 8, 1975 (Pet. App.

14a-16a). By order of September 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 30, 1975 (Pet. App. 17a), and the petition was filed on that date.

QUESTIONS PRESENTED

1. Whether the government violated petitioner's Sixth Amendment right to counsel by secretly recording incriminatory conversations with a government witness.

2. Whether the district court denied petitioner due process of law by improperly excluding exculpatory testimony of the witness that had been recorded.

3. Whether there was unnecessary preindictment delay in violation of petitioner's Fifth and Sixth Amendment rights.

4. Whether petitioner's acquittal on the substantive counts precluded his conviction of conspiracy.

5. Whether the government suppressed exculpatory evidence.

6. Whether the government's summation and the district court's charge to the jury impermissibly altered the government's theory of the case to petitioner's detriment.

STATEMENT

In February of 1974, petitioner was indicted in a sixteen-count indictment charging him and three others with fraud in the offer and sale of securities

(count 2), fraud in the purchase and sale of securities (counts 3 through 6), mail fraud (counts 7 through 10), and conspiracy to commit these substantive offenses (count 1), in violation of 15 U.S.C. 77q, 77x, 78j(b), 78ff, and 18 U.S.C. 1341, 371 and 2. Counts eleven through sixteen charged Philip Stoller, one of petitioner's three codefendants, who was tried jointly with petitioner, with making false statements, in violation of 18 U.S.C. 1001.[1]

A second three-count indictment, filed on August 1, 1974, charged petitioner and Stoller with obstruction of justice. Upon the government's motion, and without petitioner's objection, the two indictments were consolidated for a jury trial in the United States District Court for the Southern District of New York. During trial, the court granted judgments of acquittal on the three counts of obstruction of justice (Tr. 2171-2177). Petitioner was convicted of the conspiracy charged in the first indictment and acquitted on the remaining substantive counts. He was sentenced to two years' imprisonment and was fined $2,500.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-11a).

The evidence at trial showed that early in 1968, Elmer Moss, President of Training With The Pros, Inc. (TWP), a small sales training business operat-

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[1] A second codefendant pleaded guilty to the conspiracy count and did not stand trial on the remaining counts. The third, a Swiss citizen, remains a fugitive in Switzerland.

[2] Stoller was convicted of conspiracy and eleven substantive offenses.

ing from New York City, asked Raymond N. D'Onofrio for assistance in underwriting a public offering of TWP stock. D'Onofrio agreed and arranged to have Joseph Pfingst, an attorney, represent the company in the underwriting (Tr. 121-127). At a subsequent meeting in Zurich, Switzerland, D'Onofrio, Pfingst, and codefendants Philip Stoller and Jerome Allen devised a scheme to acquire a large number of shares of the initial offering of TWP stock, to inflate the price artificially through a series of "phony sales," and then to sell the shares to two stock accounts controlled by codefendants Stoller and Allen at the Swiss Bank Hofmann (Tr. 140-148, 1244-1246).

In November of 1968, Stoller, Allen and D'Onofrio met with petitioner, a practicing attorney in New York City, who pointed out several errors in their scheme. Petitioner advised them to disguise their large volume purchase by using several friendly nominees initially to acquire the TWP shares and then to buy the stock from the nominees. For his advice, petitioner was promised $15,000 and 1,000 shares of TWP stock (Tr. 168-177).

Pursuant to petitioner's advice, the group's nominees obtained 14,900 shares of the initial stock offering. Shortly thereafter, Stoller, Allen, and D'Onofrio bought the stock from their nominees and deposited it in their Swiss accounts (Tr. 87-88, 194-195, 198-201, 1817-1819, 1839-1842). When the stock reached a value of $45 to $50 per share, the trio sold the stock

to the two Swiss accounts controlled by Stoller and Allen (Tr. 223-228). To complete the sale, Stoller, Allen, and D'Onofrio had to provide the Swiss Bank Hofmann with receipts showing that they had purchased the stock from their respective nominees in whose names the stock remained registered (Tr. 660-690). With petitioner's assistance, the receipts were obtained and delivered to Alfred Herbert, a codefendant employed by the Swiss Bank Hofmann, and the sale was completed (Tr. 256-259, 1071).

Stoller, Allen, and D'Onofrio subsequently promoted TWP stock to New York brokers so that it would further increase in price, thus allowing their two customers to sell at a profit (Tr. 284-286, 1854-1857, 1908-1913, 1927-1935). While the group was promoting the TWP stock, the Securities and Exchange Commission received an anonymous letter which prompted the investigation that uncovered the fraudulent scheme (Tr. 291-292, 1085).

ARGUMENT

1. Petitioner contends (Pet. 14-22) that the government violated his Sixth Amendment right to counsel by secretly recording incriminatory conversations with codefendant Jerome Allen, who had agreed to assist the government with its investigation.

Shortly after the return of the securities fraud indictment, Allen informed a government investigator that petitioner had twice asked him to sign a false affidavit which would refute the charges against petitioner (Tr. 1403-1404). The government there-

upon devised a plan to record conversations between petitioner and Allen, but it specifically instructed Allen to confine his conversations with petitioner to matters involving perjury and obstruction of justice and cautioned him not to discuss the substance of the securities fraud indictment (Tr. 1412, 1427). Allen nevertheless subsequently recorded a conversation with petitioner during which petitioner acknowledged having received $15,000 for his part in the stock scheme and having devised a false explanation for the payment.[3] Since the recorded conversations included evidence of the fraudulent stock scheme as well as the obstruction of justice charges which were subsequently filed against petitioner and joined for trial, the trial court excluded the recordings from evidence to preclude the possibility that the jury would consider the conversation as evidence on the fraud charges (Tr. 2046-2047, 2061, 2074-2076).[4]

In claiming that his Sixth Amendment right to counsel was violated by the recordation of his conversations with Allen, petitioner relies on *Massiah* v. *United States*, 377 U.S. 201. Unlike the situation in *Massiah*, however, the government here did not deliberately elicit from petitioner admissions con-

[3] The tape recording (Government's Exhibit 101) was made available to the defense nearly three months before trial, and the transcript (Government's Exhibit 101B) was given to defense counsel just prior to trial.

[4] The inability of the government to use the tapes led to the judgments of acquittal on the obstruction of justice charges. See Pet. App. 7a-8a, n. 6.

cerning the pending indictment, but merely conducted a permissible investigation of petitioner's post-indictment attempts to commit the separate and distinct offenses of subornation of perjury and obstruction of justice. See *Hoffa* v. *United States*, 385 U.S. 293, 304-310; *United States* v. *Hayles*, 471 F.2d 788, 791-792 (C.A. 5), certiorari denied, 411 U.S. 969; *United States* v. *Osser*, 483 F.2d 727, 730-734 (C.A. 3). In any case, none of the tapes was introduced in evidence.

Petitioner contends that he was prejudiced by the mere existence of the incriminating tapes because their potential use for impeachment purposes deterred him from testifying. This Court has ruled, however, that the unconstitutional acquisition of trustworthy evidence does not preclude its use for the purpose of impeachment. *Oregon* v. *Hass*, 420 U.S. 714; *Harris* v. *New York*, 401 U.S. 222; *Walder* v. *United States*, 347 U.S. 62. As the court of appeals held (Pet. App. 8a): "The *Massiah* context here, at least in the light of the Government's good faith effort not to violate appellant's Sixth Amendment rights, does not differentiate this case."

2. Petitioner next claims (Pet. 23-30) that the trial court denied him due process of law by improperly instructing the jury that it must not consider Jerome Allen's testimony relative to petitioner.

Allen was called as a witness by codefendant Stoller and testified in a manner which contradicted his tape recorded conversation with petitioner (Tr. 2749-2750a, 2870). After cross-examining Allen on the

contradictions, the government showed him a transcript of his recorded conversation; Allen stated that his recollection of the conversation was not refreshed (Tr. 2870-2872). The trial court then excused the jury and cautioned the witness against committing perjury (Tr. 2872).

After consulting with his attorney, Allen claimed his privilege against self-incrimination and refused to answer any questions concerning the conversation (Tr. 2880). The government subsequently moved to admit the tape recording to impeach Allen (Tr. 3075-3077). The trial court ruled that rather than allow the government to use the tape for impeachment, it would instruct the jury that it must not consider any of Allen's testimony relating to petitioner, and did so (Tr. 3098, 3169-3170).

The ruling of the district court was a proper exercise of its discretion. It would have been unfair to the government and a frustration of the search for truth to permit Allen's testimony to be considered by the jury without the benefit of knowing about the contents of the excluded tapes and without the benefit of any cross-examination of Allen after he had invoked his Fifth Amendment privilege. The only alternatives to striking Allen's testimony were to direct the witness to answer the question despite his invocation of the Fifth Amendment, to admit the previously excluded tape recording, or to permit the jury to accept as true Allen's uncontradicted testimony. Each of these options was unfair to someone—either to

Allen, to petitioner or to the government—and each, as the court of appeals noted (Pet. App. 9a), "carried substantial mistrial risks." In these circumstances, the striking of all of Allen's testimony relating to petitioner was proper.

3. Petitioner argues (Pet. 31-40) that his right to a fair trial under the Fifth and Sixth Amendments was prejudiced by the four-year, eight-month delay between the termination of the conspiracy in June of 1969, and his indictment on February 14, 1974.

The Sixth Amendment's guarantee of speedy trial, however, does not apply until a person has been formally accused of a crime either by arrest or by the filing of an indictment or information. *United States* v. *Marion*, 404 U.S. 307, 313-320. Thus, the preindictment delay of which petitioner complains raises no Sixth Amendment speedy trial issue. Nor has petitioner established "substantial prejudice to [his] rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage," both of which must be proven to establish a speedy trial claim under the Fifth Amendment's Due Process Clause. *United States* v. *Marion*, *supra*, 404 U.S. at 324 (emphasis supplied); *United States* v. *Brown*, 511 F.2d 920, 922-923 (C.A. 2).

The only prejudice claimed by petitioner arose from the death of TWP President Elmer Moss who, petitioner alleges, would have contradicted several government witnesses. However, petitioner, although aware of Moss' illness, failed to depose him (*United States* v. *Schwartz*, 464 F.2d 499, 505 (C.A. 2), cer-

tiorari denied, 409 U.S. 1009) or to move for a speedy trial (*United States* v. *Stein*, 456 F.2d 844, 849-850 (C.A. 2), certiorari denied, 408 U.S. 922). Moreover, petitioner makes no allegation of governmental misconduct or bad faith designed to secure a delay for tactical advantage.[5]

4. Petitioner next contends (Pet. 41-45) that his conviction on the conspiracy count is precluded by "fundamental fairness" because of his acquittal on the substantive counts. Petitioner maintains that since two or more persons participated in the activities charged in each substantive count, the conspiracy count was "superfluous" and designed only to secure procedural advantages.

The commission of a substantive offense and a conspiracy to commit the offense are separate and distinct crimes, and a defendant properly may be charged with and convicted of both. See *Iannelli* v. *United States*, 420 U.S. 770, 777-779; *United States* v. *Feola*, 420 U.S. 671, 693-694; *Callanan* v. *United States*, 364 U.S. 587, 593; *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643. Moreover, none of the substantive crimes charged against petitioner required mutual agreement as an essential element; each could be commit-

[5] Petitioner's reliance (Pet. 39) on *Ross* v. *United States*, 349 F.2d 210 (C.A.D.C.), is misplaced; for contrary to petitioner's assertion, that "unique line of cases" in the District of Columbia Circuit is based on the court of appeals' "purported supervisory jurisdiction" and not on the Constitution. *United States* v. *Marion*, *supra*, 404 U.S. at 317, n. 8.

ted by one person alone. Thus, the charge of conspiracy was not "superfluous" but was entirely separate from the substantive offenses. Petitioner's conviction for conspiracy is therefore valid.

5. Petitioner claims (Pet. 46-51) that the government suppressed exculpatory evidence contained in a sentencing memorandum submitted to the trial court at the time of the sentencing of government witness D'Onofrio. However, the court of appeals examined the D'Onofrio sentencing memorandum *in camera* and found "no Jencks act or *Brady* material (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) not already disclosed to [petitioner]" (Pet. App. 10a). There is no reason for this Court to review that finding.[6]

6. Finally, petitioner argues (Pet. 51-52) that the government's summation and the trial court's charge altered, to his prejudice, the government's theory of the substantive offense charged in count two from the fraudulent manipulation of TWP stock to the omission of a material fact (undisclosed underwriters) in the offer and sale of securities.

[6] Petitioner suggests that the government promised D'Onofrio an eighteen-month sentence at Eglin Air Force Base and then suppressed this information from petitioner at trial (Pet. 49). The allegation is groundless. D'Onofrio was told at the conclusion of the petitioner's trial that the government would ask the trial judge to speak to D'Onofrio's sentencing judge. The government did so by letter of October 29, 1974. In any event, since petitioner admits that he knew of this allegation from Melvin Hiller's testimony at trial (Pet. 49), petitioner was not prejudiced by the government's alleged misconduct. See *United States* v. *Stewart*, 513 F.2d 957, 959-960 (C.A. 2).

Petitioner's contention is factually incorrect. Count two of the indictment charged, among other things, the "obtain[ing] of money or property by means of any untrue statement of a material fact or any omission to state a material fact * * *." The government's summation and the trial court's charge properly addressed this offense as alleged in the indictment. In any event, petitioner was acquitted on count two and convicted of a conspiracy having three objectives, only one of which was charged as a substantive offense in count two. Where, as here, the evidence establishes a defendant's agreement to accomplish at least one of a conspiracy's multiple criminal objectives, the conspiracy conviction is valid. *United States* v. *Papadakis*, 510 F.2d 287, 297 (C.A. 2); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (C.A. 7), certiorari denied, 411 U.S. 964.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7] In addition to the claims discussed herein, petitioner seeks to adopt all of the other arguments made in the court of appeals (Pet. 52). We deem it inappropriate under Rule 23 (1) (c) of the Rules of this Court to respond to these contentions since they are not set forth in the petition.

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